STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v KEVIN JAMES ALLEN, Defendant-Appellant.	No. 258820 Oakland Circuit Court LC No. 2004-196386-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ONDRE QUINTRELL HULING, Defendant-Appellant.	No. 258821 Oakland Circuit Court LC No. 2004-196385-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ADAM T. MEYERS, Defendant-Appellant.	No. 259144 Oakland Circuit Court LC No. 2004-196387-FC

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Defendants Kevin James Allen, Ondre Quintrell Huling, and Adam T. Meyers were tried jointly before separate juries. Defendants Allen and Huling were each convicted of two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and two counts

of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant Meyers was convicted of one count of armed robbery, first-degree home invasion, and one count of assault with intent to do great bodily harm less than murder. All three defendants appeal as of right. We affirm.

I. Underlying Facts

On the evening of April 22, 2004, 60-year-old James Miller and his adult daughter, Virginia Miller, were attacked and robbed in their home. James testified that, as he was sleeping, a man wearing dark clothes, dark gloves, and a mask, struck him in the forehead with what could have been a knife. A second man then struck James with a heavy object similar to a baseball bat. James was also stabbed in the head. During the assault, the perpetrators asked James the whereabouts of his son, "Leo," and one man stated that Leo had "f**ked [his] family, I'm going to f**k with you." While James was being assaulted, he could hear Virginia being dragged around in another room, and the voice of a third man.

Virginia testified that, while she was sleeping, defendant Allen[1] hit her on the head with a tire iron. He then dragged Virginia by her hair and clothing into the living room where he repeatedly hit her in the head, arm, foot, and hand with the tire iron. During the assault, defendant Allen asked the whereabouts of Leo, and for money. Defendant Allen took Virginia back into her room, searched her belongings, and took her watch and jewelry. Virginia also gave defendant Allen money from her wallet. Defendant Allen then took Virginia into James' room, where she saw James being held facedown, and hit repeatedly. Virginia explained that all three men were armed with tire irons, and wearing bandannas. Defendant Allen instructed one of the perpetrators to tie up Virginia. At trial, Virginia identified defendant Meyers as the man who grabbed her, and took her around the house looking for something to tie her up. When defendant Meyers could not find anything, he brought her back into the room. The three men then left the house.

James indicated that his pants, cell phone, a wallet containing $40, and a paycheck from Hollywood Market were missing from his bedroom. Virginia called 911, and described the car the defendants were driving. The day after the incident, defendant Meyers came to the Miller home and discussed inviting Leo to a party. Both Virginia and James recognized defendant Meyers. After defendant Meyers left, Virginia called the police and gave his name.

On the day after the incident, defendants Allen and Huling attempted to cash James' paycheck at a neighborhood store. One storeowner testified that defendant Allen, whom he previously knew, identified defendant Huling as "James Miller," but defendant Huling had no identification, and gave a wrong number for the market. The storeowner called the police, who

[1] Virginia testified that she recognized defendant Allen and, although he was wearing a bandanna, it slipped off his face. She did not immediately recall defendant Allen's name, but remembered it approximately a day after the incident, and informed the police. She also informed the police that all three defendants were her brother's acquaintances.

arrived at the store, and followed the identified vehicle. Defendant Huling fled from the moving vehicle, and when he was apprehended, James' paycheck stub was in his pocket.

Katrina Ewing, defendant Allen's girlfriend, testified that on the night of the robbery, defendant Allen said that he and defendant Meyers were planning to "hit a lick," meaning to commit a robbery. Eventually, the three defendants were in her house, which she shared with defendant Allen, and discussed committing a robbery, including that the targets were an older man and his daughter who lived nearby. When the defendants emerged from a bedroom, defendants Allen and Meyers were dressed in dark clothes, and all three were wearing something that partially covered their faces. The defendants left in Ewing's car, and returned about 1-1/2 hours later with a pair of man's pants, cell phones, jewelry, and a paycheck. Ewing heard the three defendants brag about having broken into a man's house. Defendant Huling subsequently left, but defendant Meyers stayed the night. The next morning, Ewing drove defendants Huling and Allen to several stores, attempting to cash the paycheck. Defendant Huling ran out of the last store, and directed Ewing to drive. Ewing eventually stopped after noticing the police, and defendant Huling fled.

Upon searching defendant Allen's home, the police found James' pants, a cell phone case, a bandanna with eye cutouts, and a tire iron. In a statement to the police, defendant Allen initially denied any culpability, but after learning that the police had spoken with Ewing, admitted that he, defendant Meyers, and defendant Huling went to Leo's home to recover defendant Allen's wallet from Leo. Defendant Allen claimed that they entered the victims' home, and defendant Huling went crazy.

In a statement to the police, defendant Meyers also initially denied any wrongdoing, but subsequently admitted that he was at defendant Allen's home on the night of the robbery, heard defendant Allen mention committing a robbery, and accompanied defendants Allen and Huling to the victims' home. Defendant Meyers claimed that he did not initially enter the victims' home with defendants Huling and Allen, but subsequently entered only to give assistance after hearing screams coming from the house. He admitted that he placed a bandanna over his face before entering. Once inside, he was ordered to tie up Virginia, but instead allegedly took her to the bathroom and wiped her face. In the interim, defendants Allen and Huling restrained James, and ransacked his room. Defendant Meyers claimed that he went to the victims' home on the following day to explain the situation, but "froze up."

Defendant Allen's mother testified on his behalf, and claimed, inter alia, that, before the preliminary examination, she observed a police detective telling Virginia what to say, and heard the prosecutor state that they had no evidence against defendants Allen and Meyers, and instructed Virginia to identify the two men. Defendant Huling's mother testified that, on the night of the incident, she saw him throughout the night. She claimed that he could not have left the house and reentered because the alarm would have sounded, and he does not have a key.

II. Defendant Allen's Issues in Docket No. 258820

A. Prosecutorial Misconduct

Defendant Allen first argues that he is entitled to a new trial because the prosecutor improperly denigrated both himself and defense counsel, urged the jury to convict him based on

sympathy, and engaged in "outrageous" behavior throughout trial. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant Allen failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

1. Denigration of Defense Counsel

Defendant Allen claims that in the following comments made during closing argument, the prosecutor improperly denigrated defense counsel by indicating that the three defense attorneys treated the victims harshly, which he contends was not true:

> And although I sat in this courtroom with all of you and watched three attorneys beat up on Virginia Miller and her father.
>
> * * *
>
> So for almost a day of mother - strike that, of a daughter and a father being, I can't even describe that of what happened to those two victims by the defense team, over what?
>
> * * *
>
> I sat here and watched this woman get beat up by the defense attorneys.

Defendant Allen claims that the prosecutor continued to make improper denigrating remarks during closing and rebuttal arguments when she suggested that defense counsel was attempting to mislead the jury by presenting "garbage," and throwing "mustard" and "sand" in the jurors' eyes. For example, the prosecutor stated:

> All three defendants discussed doing this and who is their target, I want you to start thinking a little bit about this because I hope that the sand that was thrown in your eyes isn't sticking.
>
> * * *
>
> You know we wasted almost a half a day on that garbage trying to implicate a prosecuting attorney who would never need this testimony to begin with.
>
> * * *
>
> All this garbage about was the door broken, was the door unlocked, is not relevant . . . . That's mustard that's being thrown in your faces hoping you won't see the elements of this crime.

* * *

> Detective Wittebort asked [defendant Allen] where were you and he lied. And then Detective Wittebort and Detective Buchanan said I'm sorry we talked to your girlfriend, your girlfriend said that's not true, you were out. And then the defendant changed his story. I'm not sure I hear the badgering here. That's here again throwing things, what I call sand in your eyes so you won't pay attention to what you actually heard. That's what I'm taking about when I say sand.
>
> * * *
>
> Virginia Miller was asked on the stand, particularly about this garbage with [an assistant prosecutor] and Detective Wittebort.
>
> * * *
>
> So even if you believe all of that, and I hate to say garbage that's exactly what it is, it still doesn't prevent a guilty verdict.

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorney's personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Considered in context, the challenged remarks, which drew no objection, did not amount to an improper personal attack on defense counsel, or improperly shift the jury's focus from the evidence to defense counsel's personality. Some of the remarks were plainly focused on refuting defense counsel's assertions made during trial and closing argument. Specifically, the prosecutor's remarks conveyed her contention that, based on the evidence, any defense based on the victims wrongfully identifying the defendants, the police coercing defendant Allen into making a statement, and the police and prosecutor allegedly directing Virginia to identify defendant Allen was a pretense or irrelevant, and ignored the evidence. In making the challenged remarks, the prosecutor urged the jurors to recall that the defense attorneys had an ample opportunity to examine the victims, to evaluate the evidence, and to consider that, in light of the evidence, defendant Allen was guilty. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to her theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Consequently, this claim does not warrant reversal.

2. Denigration of Defendant

Defendant Allen also argues that the prosecutor denigrated his character by directing a "snide remark" at him. During her redirect examination of Ewing, the prosecutor questioned Ewing about defendant Allen directing her to write a fabricated letter stating that she had lied at

the preliminary examination, and defendant Allen also allegedly assuring her that she could not be jailed for her possible involvement in the incident. The following exchange then occurred:

> *The prosecutor*: So, when the detectives serve you with the court order to be here they ask you about the letter, correct?
>
> *Ewing*: Yes.
>
> *The prosecutor*: And [the police] say why are you going to lie, and you tell them what, genius over here has done research and you can't get into trouble for it?

A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Here, even if the challenged remark was improper, it does not warrant reversal. Defense counsel objected to the remark, stating, "It's so prejudicial," and the trial court sustained the objection and struck the remark. Defense counsel did not request a curative instruction, or otherwise request any other action by the court. Nonetheless, in its final instructions, the trial court directed the jury not to consider any excluded evidence or stricken testimony, and to decide the case based only on the properly admitted evidence. Under these circumstances, the prosecutor's brief comment did not deny defendant Allen a fair trial. See *People v McLaughlin*, 258 Mich App 635, 648; 672 NW2d 860 (2003) (where the prosecutor's "brief expression of mild sarcasm . . . was not so prejudicial that it could have affected defendant's substantial rights").

3. Appealing to Sympathy

Defendant Allen next argues that the prosecutor impermissibly appealed to the jurors' sympathy during rebuttal argument when she stated:

> You want to feel sorry for somebody, you feel sorry for the victims because this [defendant] is not somebody deserving of your sympathy. You are to find him guilty based on the evidence that was presented and because he is guilty, because he did this.

Prosecutors should not resort to arguments that appeal to the jury to sympathize with the victim. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Viewed in context, the remark, which drew no objection, did not improperly suggest that the jury should convict defendant Allen on the basis of sympathy, but urged the jurors not to "feel sorry" for him because of certain life circumstances that had been discussed, and to convict him on the basis of the evidence. To the extent the prosecutor's remarks could be considered improper, they involved only a brief portion of her closing and rebuttal arguments, occurred after a lengthy and detailed discussion of the evidence, and were not so inflammatory that defendant Allen was prejudiced. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Moreover, the trial court's instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Consequently, this claim does not warrant reversal.

4. "Outrageous Courtroom Behavior"

Defendant Allen also contends that, in general, the prosecutor's conduct throughout the trial was "outrageous." Defendant Allen first explains that, during trial, the prosecutor "loomed behind the defendants," and "pointed at them with objects." Apparently, during trial, a defense attorney objected and a sidebar discussion was held. Subsequently, the trial court stated the following on the record:

> All right, I want to say something to the attorneys. There's been a lot of comments made about what the other attorney is saying. One of the attorneys and his client were laughing, you know, a little bit of that is nature but I think this is going overboard and I think its very unprofessional for the jurors to see this. I'm going to ask everyone to please keep their comments to themself [sic]. *I want to clarify the ruling that I made regarding the prosecutor was that I didn't want her walking over near the defendants. I didn't say she couldn't point at them, I can't stop her from that if that's her style in front of a jury, but my ruling is that I don't want her walking over near them*[.] (emphasis added.)

There is no indication in the record that the prosecutor continued to walk by or near defendant Allen after the trial court's ruling. Also, apart from his general assertion, defendant Allen has not cited any support for his claim that pointing toward a defendant during trial is outrageous and prejudicial conduct. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Defendant Allen has not demonstrated that the prosecutor's conduct denied him a fair trial.

Defendant Allen next contends that the prosecutor engaged in outrageous conduct when, during defense counsel's cross-examination of James, she answered for the witness:

> *Q* [by defense counsel]: Did you ask the person what his name was or anything of that kind?
>
> *The prosecutor*: *No.*
>
> *A*. Uh-uh, I didn't care.
>
> *Q*. All right. So you weren't interested about him going into the Navy of him -
>
> *The prosecutor*: Objection.
>
> *The court*: I'll overrule the objection. (emphasis added.)

Defendant Allen did not object to the prosecutor's actions, and it is not clear from the record that the prosecutor was actually answering for the witness, as opposed to preparing to object to the question. Even assuming that the prosecutor did answer the question, defendant Allen fails to adequately argue how the prosecutor's conduct denied him a fair trial. Again, an appellant may not merely announce his position and leave it to this Court to discover and

rationalize the basis for his claims. *Watson*, *supra*. Further, defense counsel had an opportunity to continue to question the witness, and give him the opportunity to complete any answer that was seemingly cutoff by the prosecutor. Moreover, the trial court's instructions that the lawyers' comments are not evidence were sufficient to dispel any possible prejudice. *Long*, *supra*. Accordingly, defendant Allen has failed to establish the requisite prejudice to warrant reversal.

Defendant Allen also contends that "other actions by the prosecutor occurred while the jury was absent, but nevertheless illuminate the prosecutorial over-reaching in this case." Because those alleged instances of misconduct occurred outside the presence of the jury, they did not deprive defendant Allen of a fair trial. See *McLaughlin*, *supra* at 648 n 5 ("there was no prejudice from [the prosecutor's] conduct because the jury did not hear any of it"). Defendant Allen is not entitled to a new trial on this basis.

B. Exclusion of Evidence

Next, defendant Allen argues that the trial court abused its discretion when it precluded defense counsel from presenting vital impeachment evidence through defendant Allen's mother, thereby violating his constitutional right to present a defense. We disagree.

At trial, Ewing admitted that the first time she spoke to the police she lied to protect defendant Allen. In a second statement, she inculpated all three defendants. At the preliminary examination, Ewing testified, inter alia, that the defendants discussed committing a robbery, left wearing dark clothing, and subsequently returned with the stolen property. Subsequently, Ewing wrote a letter, indicating that she had lied at the preliminary examination, and that defendant Allen was not involved. At trial, Ewing testified for the most part consistent with her preliminary examination testimony, i.e., that defendant Allen was involved, although she indicated that she had lied about some specifics at the preliminary examination. She testified that her trial testimony was truthful, and explained that, after the preliminary examination, she recanted her testimony at the behest of defendant Allen. After speaking with the police approximately three weeks before trial, she decided to testify truthfully at trial. During the cross-examination of Ewing, defense counsel asked if she had ever told anyone that she lied at the preliminary examination. She claimed that she told only her father.

During defense counsel's direct examination of defendant Allen's mother, he asked, "Did [Ewing] ever tell you that she lied in exam [sic]?" The prosecutor objected, arguing that the answer called for hearsay, and did not meet the requirements of MRE 613(b). Defense counsel responded, inter alia, that he is "not estopped from putting on a defense and impeaching witnesses." The trial court sustained the prosecutor's objection.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Watson*, *supra* at 575. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Ullah*, *supra* at 673. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

On this record, even if the trial court abused its discretion by excluding the evidence, the error was harmless. A preserved nonconstitutional error is not grounds for reversal unless it is

more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant Allen claims that the proposed extrinsic evidence was offered to impeach Ewing's credibility, and that "had Mr. Allen been able to ask the proposed questions, the jury would have learned that Ms. Ewing had confessed that these statements were lies. This goes to the heart of the allegations against Mr. Allen."

Despite the challenged evidentiary ruling, the fact that Ewing had lied at times throughout this case was undisputed and extensively discussed at trial, and the proposed evidence would have done little to further impeach Ewing's credibility. As previously noted, Ewing admitted at trial that she had recanted her preliminary examination testimony, and had written a letter in which she stated that she had lied at the preliminary examination. Ewing also testified that she told her father that she had lied at the preliminary examination, and, at one point, also told a codefendant's counsel that she accused all three defendants at the preliminary examination because she was concerned about being charged. Further, even at trial, Ewing admitted that parts of her preliminary examination were not completely true. Under these circumstances, evidence that Ewing also allegedly told defendant's mother that she had lied at the preliminary examination would have been inconsequential. The admitted evidence was sufficiently detailed and compelling to render the preclusion of the proposed evidence harmless.

We also reject defendant Allen's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

The trial court's ruling did not amount to a blanket exclusion of all evidence challenging Ewing's credibility, or otherwise limit defendant Allen's opportunity to present a defense. Moreover, contrary to defendant Allen's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Accordingly, reversal is not warranted on this basis.

III. Defendant Huling's Issues in Docket No. 258821

A. Jury Instructions

Defendant Huling argues that he is entitled to a new trial because the trial court failed to sufficiently instruct the jury on the specific intent necessary for conviction as an aider and abettor, and failed to instruct the jury on the lesser included offense of unarmed robbery. We decline to review defendant Huling's challenges to the jury instructions because the record reflects that defense counsel expressed satisfaction with the trial court's instructions. Defendant Huling's affirmative approval of the instructions waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

B. Effective Assistance of Counsel

Defendant Huling alternatively argues that defense counsel was ineffective for failing to request the omitted instructions. Because defendant Huling failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*.

1. Aiding and Abetting

"Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003) (citations omitted). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *McLaughlin*, *supra* at 668.

Defendant Huling has failed to demonstrate that defense counsel's failure to request that the specific intent instruction, CJI2d 3.9, be read with the aiding and abetting instruction was prejudicial. Defendant Huling correctly argues that a person can be convicted of a specific intent crime under an aiding and abetting theory only if he possessed the specific intent required of the principal or knew that the principal possessed that intent. See *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted). But when examined in their entirety, the trial court's instructions clearly conveyed the necessary elements of aiding and abetting, including the required intent. Before instructing on aiding and abetting, the court instructed on the principal offenses, and gave the specific intent instruction, CJI2d 3.9, in reference to those charges. When instructing on aiding and abetting, the court instructed the jury that "defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission . . . ." Although the trial court did not contemporaneously give the specific intent instruction with the aiding and abetting instruction, it told the jury that aiding and abetting required the same intent as the principal offenses. Viewed in their entirety, the instructions were legally accurate and adequately protected defendant Huling's rights. It follows, therefore, that defense counsel's failure to separately request a specific intent instruction as part of the court's aiding and abetting instruction did not deprive defendant Huling of the effective assistance of counsel. *Effinger*, *supra*.

2. Unarmed Robbery

Unarmed robbery is a necessarily lesser included offense of armed robbery. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). "The element distinguishing unarmed robbery from the offense of armed robbery is the use of a weapon or an article used as a weapon." *Reese*, *supra*. Consequently, here, in order to be supported by a rational view of the evidence, there must be evidence to support a finding that the defendants did not use a weapon. *Cornell*, *supra* at 361.

Here, an instruction on unarmed robbery was not warranted because a rational view of the evidence did not support it. Simply put, there was no evidence that the perpetrators were not armed. Defendant Huling did not dispute that the three perpetrators were armed, but only claimed that he was not present. James testified that, during the incident, he was struck multiple times with what may have been a baseball bat, and also stabbed several times in the head with what he believed was a knife. Virginia testified that she was repeatedly struck in the head, arm, foot, and hand with a tire iron. Because a rational view of the evidence did not support an instruction on unarmed robbery, defense counsel was not ineffective for failing to request such an instruction. Counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

IV. Defendant Meyers' Issues in Docket No. 259144

A. Sufficiency of the Evidence

Defendant Meyers argues that there was no evidence that he agreed to participate in the acts, or assisted or encouraged the codefendants, and, therefore, the evidence was insufficient to sustain his convictions. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id*. at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). The elements of first-degree home invasion are (1) the defendant broke and entered a dwelling or entered the dwelling without permission, (2) that when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being

present in, or exiting the dwelling; and (3) the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. MCL 750.110a(2). "Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

Defendant Meyers does not challenge the individual elements of the offenses. Rather, he alleges that there was insufficient evidence that he aided and abetted the codefendants in the commission of the crimes. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Izarraras-Placante*, *supra*.

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines*, *supra* at 757; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Furthermore, an aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, *supra* at 758. But a defendant's mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make him an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Viewed in a light most favorable to the prosecution, the evidence of defendant Meyers' actions and association with the codefendants was sufficient to enable a rational trier of fact to conclude that defendant Meyers aided and abetted in the crimes of armed robbery, home invasion, and assault with intent to cause great bodily harm less than murder. The evidence, if believed, supported an inference that the defendants convened, and jointly planned to enter the victims' home and commit a robbery. There was evidence that, on the day of the crimes, all three defendants discussed committing a robbery while at codefendant Allen's house. Defendant Meyers then accompanied the codefendants to the victims' home, and entered the home wearing a bandanna. There was also evidence that defendant Meyers, along with codefendant Huling, assaulted James. Virginia testified that, at one point, defendant Meyers was ordered to tie her up, and he dragged her around looking for something to bind her. Virginia denied that defendant Meyers attempted to assist her at this time. Additionally, there was evidence that defendant Meyers fled the scene with the codefendants, returned to codefendant Allen's house where the defendants bragged about the robbery, and stayed the night.

Despite defendant Meyers' argument to the contrary, his conduct before, during, and after the incident was sufficient to enable the jury to find, beyond a reasonable doubt, that he assisted the codefendants in the commission of the crimes with knowledge of their intent. Although defendant Meyers asserts that evidence supporting his involvement was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63;

594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant Meyers' convictions of armed robbery, home invasion, and assault with intent to do great bodily harm less than murder.

B. Effective Assistance of Counsel

1. *Batson* Challenge

Defendant Meyers, an African-American man, argues that defense counsel was ineffective when he waived or failed to adequately preserve a *Batson*[2] challenge. We disagree. Because defendant Meyers failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *Ginther*, *supra*; *Sabin (On Second Remand)*, *supra*.

Defendant Meyers appears to contend that he was denied his constitutional right to an impartial jury when the prosecutor used two peremptory challenges to strike African-American jurors in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The Equal Protection Clause guarantees to a defendant a jury whose members are selected by nondiscriminatory methods. *Id*. at 85-86. In *Batson*, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to strike African-American jurors from an African-American defendant's jury simply because the jurors are African-American. The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Id*. at 93-94. In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against African-American jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Id*. at 97. If a defendant makes such a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging African-American jurors. *Id*. at 97-98.

Here, defendant Meyers failed to establish purposeful discrimination. Defendant Meyers essentially argues that, because two African-American jurors were removed by peremptory challenge, the prosecutor's removals indicate a pattern of discrimination. But the mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from a jury venire is insufficient to establish a prima facie showing of discrimination. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Additionally, the record discloses that three African-American jurors remained on the jury, which militates against a finding of purposeful discrimination. *Id*.

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

Even assuming that defense counsel could have established a prima facie case of purposeful discrimination in the selection of jury members, the prosecutor provided race-neutral reasons for excusing the two African-American jurors. The prosecutor indicated that the first juror was removed because he stated that he would be preoccupied during trial. During voir dire, the juror explained that he is a high school teacher, and would be "preoccupied" with his own concerns related to his students. The second juror stated that he was convicted of carrying a concealed weapon seven years previously, which had since been expunged. The prosecutor explained that he removed the juror because this case involved felonies and the use of weapons and, given the juror's weapon conviction, he may be sympathetic to defendant Meyers. "[U]nless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995) (citation omitted). Further, it was reasonable for the prosecutor to attempt to achieve a jury that would be alert and interested in the facts and proceedings of the case, as well as one that would not be sympathetic to defendant Meyers.

In sum, because defense counsel's failure to pursue a *Batson* challenge did not prejudice defendant Meyers, he was not deprived of the effective assistance of counsel.

2. Lesser Included Offenses

Defendant Meyers also argues that defense counsel was ineffective for failing to request any lesser included offenses. But defendant Meyers does not identify what lesser offense instructions should have been requested. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted).

Moreover, defendant Meyers has failed to overcome the presumption that defense counsel's failure to request any lesser included offenses was sound trial strategy. The defense strategy was to argue that defendant Meyers was simply not culpable. Defense counsel's decision to pursue this defense, and not request other instructions, falls within the purview of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982) ("The decision to proceed with an all or nothing defense is a legitimate trial strategy.") "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Consequently, defendant Meyers has not established a claim of ineffective assistance of counsel.

C. Sentence

1. *Blakely v Washington*

We reject defendant Meyers' claim that he must be resentenced because the trial court's factual findings supporting his score of 10 points for offense variable 12 (contemporaneous offenses) were not determined by a jury, as mandated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as

violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

2. Proportionality

We also reject defendant Meyers' claim that he is entitled to resentencing because his sentence for armed robbery is disproportionate. Defendant Meyers' sentence of 18 to 30 years is within the applicable statutory sentencing guidelines range of 135 to 225 months. This Court must affirm a sentence within the applicable guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant Meyers has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentence. Therefore, we must affirm his sentence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald